

# Is There a Human Right to Safe Motherhood within the United Nations Legal System?

Hélène Julien\*

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## Abstract

The establishment of safe motherhood as a human right that, albeit interrelated with other women's rights, would be distinct from them, appears crucial to tackle maternal mortality and achieve gender equality. In order to be effective this right has to be framed as a holistic concept highlighting the connections between all the women's rights referring to the highest attainable standard of living, in the context of pregnancy, childbirth and lactation. Through a feminist lens, this study examines relevant United Nations legal bodies' initiatives to determine if safe motherhood is efficaciously guaranteed as a human right worldwide. The Committee on the Elimination of All Forms of Discrimination Against Women's recognition of a 'women's right to safe motherhood', which relates to the access to maternal health care, is analysed as a central element of the right. This review leads to the conclusion that the human right to safe motherhood exists, but needs to be strengthened, especially through an international acknowledgement of the right to abortion as well as the development of a stronger framework for the protection against mother-foetus/ baby HIV transmission.

## Keywords

Right to Safe Motherhood – Gender Equality – CEDAW – Right to Abortion – Highest Attainable Standard of Living – Health – HIV – Human Rights – United Nations - Motherhood – Women – Feminist Analysis.

## 1. Introduction

'Women are not dying of diseases we can't treat... They are dying because societies have yet to make the decision that their lives are worth saving'.<sup>1</sup>

This observation appears all the more regrettable, since maternal mortality is an extremely widespread problem. Every two minutes, somewhere in the world a woman passes away due to pregnancy or childbirth complications.<sup>2</sup> Maternal mortality, which is

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\* Hélène Julien is a Trainee Lawyer at the Paris Bar. She holds a LLM degree in Public International Law from Queen Mary University of London and she is a former intern at the United Nations Office of the High Commissioner for Human Rights. The opinions contained in this article are those of the author and are not necessarily agreed on by the United Nations Bodies.

<sup>1</sup> Mahmoud Fathalla (1999) cited by Amnesty International USA, 'Motherhood Shouldn't Be a Death Sentence' available at: <http://www.amnestyusa.org/our-work/issues/poverty-and-human-rights/maternal-health> (Accessed 14 June 2014).

<sup>2</sup> World Health Organization, ('WHO'), fact sheet n°34 (2014) available at: <http://www.who.int/mediacentre/factsheets/fs348/en/> (Accessed 14 June 2014).

usually defined as ‘the death of a woman while pregnant or within the duration and site of pregnancy, from any cause related to or aggravated by the pregnancy and its management but not from accidental or incidental causes’,<sup>3</sup> is the first cause of death among the female population at the age of reproduction. 99 per cent of maternal deaths occur in developing countries. Moreover, maternal morbidity, which refers to pregnancy or childbirth-related complications resulting in important, irreversible, subsequent harms,<sup>4</sup> affects women at least twenty times more frequently than maternal mortality.

Human rights responses have been formulated at national, regional and international levels. The United Nations (UN) is the only international organisation providing universal solutions to alarming human rights situations. Since the Safe Motherhood Initiative,<sup>5</sup> the UN bodies have been particularly active in addressing unsafe motherhood. It seems relevant therefore to identify and assess how, within the UN legal system, human rights are applied to safeguard women’s rights to life and their well-being before, during and shortly after childbirth; in other words, providing a guarantee of safe motherhood. Beyond tackling maternal mortality, safe motherhood aims to ‘ensure that the outcome of every pregnancy is a healthy mother and a healthy newborn’.<sup>6</sup> Safe motherhood is essential to tackle gender and socio-economic based discrimination, and to fully achieve gender equality. It also appears as an indispensable element to ensure women’s self-determination and, therefore, it has to be guaranteed at the universal level.

Hence, a human right to safe motherhood would have to provide women with specific protection while they are going through pregnancy, childbirth and lactation to enable them to become mothers safely and without experiencing social exclusion. The central attribute of this protection would be undeniably related to women’s health. According to this right, every woman in the world should be able to access relevant obstetric care services, even if she is giving birth in difficult conditions, such as in a refugee camp. Nevertheless, the scope of the human right to safe motherhood must go further than the mere protection of women’s health. States should make motherhood compatible with all aspects of a woman’s life. In other words, such a right would encompass numerous dimensions, including the possibility of access to contraceptives and abortion, and thus of founding a family as a result of an informed choice, the right to education and the right to benefit from maternity leave.

Therefore, in order to be fully effective and to lead women to empowerment, the human right to safe motherhood has to be shaped as a female-centred umbrella and evolving concept that adopts a mainstreamed approach.

This article is a feminist critical analysis of the UN legal system’s safe motherhood-related mechanisms. It aims to determine whether or not UN mechanisms have effectively constructed *de jure* and *de facto* a right to safe motherhood, which, even though it is evidently deeply intertwined with other human rights, could be considered to be a distinct and separate right. Although this question may seem theoretical, the answer implies key practical aspects. Separate protection is highly desirable, since it would have an important symbolic dimension and would raise States’ awareness about their concrete binding obligations. Moreover, recognising safe motherhood as a human right *per se* appears to be the best way to highlight how such a right could be advocated for.

This study will be structured in four parts, including the present one. The second part (2) will argue that safe motherhood refers to a feminist holistic concept that is eligible to become a human right. The third part (3) will examine the most important UN initiatives to frame a multifaceted women’s right to safe motherhood. The fourth part (4) will focus on the right-specific issues such as abortion and HIV mother-foetus/baby transmission to demonstrate

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<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> World Bank, ‘Safe Motherhood Initiative’ (1987) presented at: <http://www.safemotherhood.org/> (Accessed 4 February 2014).

<sup>6</sup> Rita Luthra, ‘Safe Motherhood: a Matter of Human Rights and Social Justice’ (2005) 42 United Nations Chronicle 14, 15.

that, although the UN's work has been instrumental in establishing a right to safe motherhood, such a right remains incomplete and needs to be strengthened in the future.

## 2. Defining Safe Motherhood in Legal Terms: a Feminist Umbrella Concept Eligible to Become a Human Right

This section aims to clarify the content of the right to safe motherhood and to demonstrate that this right is eligible to be framed as a specific and independent human right. In a first sub-section, the general features of the right to safe motherhood are pointed out. The second sub-section focuses on the peculiar characteristics that a human right to safe motherhood would have to present, in order to be effective.

### A. General Features of the Right to Safe Motherhood

In order to understand the structure and content of the right to safe motherhood, it is relevant to detail its two general features. Firstly, the right to safe motherhood is part of reproductive rights. Secondly, this right meets all the relevant criteria to be recognised as a human right.

#### (i) A Reproductive Right

The right to safe motherhood derives from reproductive rights, which are themselves parts of the right to health.

As a preliminary remark, it is pertinent to remember that the expression 'right to health' raises substantial debates. Considering that perfect health cannot be secured by States, a part of the literature, particularly Roscam Abbing, recommends the use of the terms 'right to health protection', 'right to healthcare' or the 'right to medical care'.<sup>7</sup> In contrast, Leary indicates that the phrasing 'right to health' refers to a more complete right.<sup>8</sup> Furthermore, Toebes explains that '[t]he right to health' encompasses two dimensions: on the one hand, access to 'healthcare', on the other hand, access to 'underlying preconditions for health'.<sup>9</sup> She then stresses a particularly detailed framework of States' duties induced by the tripartite typology 'respect, protect, and fulfill' pertaining to the right to health. She integrates concrete duties that result from the criteria, which States have to fulfil in providing health services,<sup>10</sup> such as availability, accessibility, affordability and quality.

In the context of this article, it is relevant to explore more deeply the obligations induced by reproductive rights.

Both the Report on the Cairo International Conference on Population and Development (the 'Cairo Programme') and the 1994 Beijing Declaration and Programme for action ('Beijing Declaration' and 'Beijing Platform' respectively) provide that '[r]eproductive health [...] implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so'.<sup>11</sup>

<sup>7</sup> Henriette DC Roscam Abbing, *International Organizations in Europe and the Right to Health Care* (Kluwer Academic 1979) 104-105.

<sup>8</sup> Virginia A Leary, 'Implications of a Right to Health' in Kathleen E Mahoney and Paul Mahoney (eds) *Human Rights in the Twenty-First Century* (Martinus Nijhoff Publishers 1993) 481, 485.

<sup>9</sup> See generally: Toebes, 'Towards an Improved Understanding of the International Human Right to Health' (1999) 21 *Human Rights Quarterly* 661.

<sup>10</sup> *ibid* 676. In its general comment n°14 the CESCR Committee lists four criteria that States have to fulfil providing health services: availability, accessibility (affordability is considered as economic accessibility), acceptability and quality, see CESCR, 'General Comment n°14' (2000) UN Document E/C.12/2000/4, para 12.

<sup>11</sup> Report on the International Conference on Population and Development (5-13 September 1994) UN Document A/Conf.171/13, para 7.2; Report of the Fourth World Conference on Women (4-15

In this regard, first, since it is shown that violence has adverse effects on women's reproductive health,<sup>12</sup> States must protect women against violence. In particular, early marriages, dietary restrictions, female genital mutilation, sexual assaults, forced sterilisation and abortion must be prohibited and effectively punished.

Second, for many international organisations and governments safe motherhood primarily refers to physical safety and aims to ensure that both mother and infant survive the pregnancy and delivery.<sup>13</sup> In this regard, 'access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant'<sup>14</sup> constitutes the core of safe motherhood. Maternal health care refers to four main elements, namely the possibilities of access to a skilled health care professional, during pregnancy, and for 42 days after the childbirth or termination of the pregnancy (in particular, in case of miscarriage), of benefiting from the presence of such a professional during delivery, and of having basic acceptable emergency obstetric care available.<sup>15</sup> Safe motherhood therefore indisputably appears as a component of reproductive health.

The Cairo Programme and the Beijing Platform restate the definition of health provided by Preamble of the WHO Constitution,<sup>16</sup> and state that reproductive health is 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes'.<sup>17</sup>

It is thus arguable that, as a part of reproductive rights and, more broadly, of the human right to health, there is a right to safe motherhood that goes beyond mere women's basic health care.<sup>18</sup> This analysis seems to converge with Johnson's, who considers that there is an 'independent human right' to maternal health care.<sup>19</sup> If the right to safe motherhood is a reproductive right, the central element of which is the right to maternal health care, it expands further and encompasses the woman's right to the highest attainable standard of living in the context of pregnancy, childbirth and lactation.

Safe motherhood also meets the criteria to be a human right, as I argue in the next section.

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September 1995) Annex I (Beijing Declaration); Annex II (Beijing Platform for Action), UN Document A/CONF.177/20 (1995), Platform para 94.

<sup>12</sup> See for example: Center for Reproductive Rights, 'Violence Against Women and Reproductive Rights in the Americas' (May 2015) available at: [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/\(EN\)%20Advocacy%20Doc%20for%20OAS%20Convening.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/(EN)%20Advocacy%20Doc%20for%20OAS%20Convening.pdf) (Accessed 8 May 2016).

<sup>13</sup> For example : The Reproductive Health for Refugees, Refugee Reproductive Health Guide to Needs Assessment and Evaluation: Draft for Field Testing (December 1984) available at : <http://www.un.org/popin/popis/refugees/refguide/safemotherhood.html> (Accessed 2 October 2015).

<sup>14</sup> Report on the International Conference on Population and Development (n 11) para 7.2.

<sup>15</sup> LS Johnson, 'The Right to Maternal Health Care: Developing International Human Rights Law to Prevent Maternal Mortality' (2010) 11 University of Botswana Law Journal 39, 41.

<sup>16</sup> The WHO Constitution Preamble defines it as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity' : Constitution of the WHO (adopted 22 June 1946, entered into force 7 April 1948) 2 Official Records of the WHO 100.

<sup>17</sup> Report on the International Conference on Population and Development (n 11), para 7.2. and Beijing Platform (n 11) para 94.

<sup>18</sup> Pallavi Trikutam, 'Redefining Safe Motherhood' (2012), available at <http://notenoughgood.com/2012/02/redefining-safe-motherhood/> (Accessed 24 September 2015).

<sup>19</sup> LS Johnson (n 15) 60.

## (ii) Meeting the Criteria for Establishing Safe Motherhood as a Human Right

Is safe motherhood eligible to become a human right? Answering this abstract question is absolutely crucial, before determining whether or not safe motherhood is effectively protected as a human right.

It is thus necessary to understand what exactly constitutes a human right. The preamble of the 1948 Universal Declaration of Human Rights (UDHR)<sup>20</sup> mentions universality and inalienability as core properties of human rights, but it does not directly define these vague concepts. Philosophically, the concept of human rights is based upon a naturalist conception according to which an individual benefits from human rights solely by virtue of being human.<sup>21</sup> For instance, the Vienna Declaration and Programme of Action consider human rights to be 'the birthright of all human beings'.<sup>22</sup> This statement begs the question: what do human rights include? Although it would have been useful to have a widely agreed upon definition of human rights, the international human rights bodies have not established a procedure with the objective of determining when a social value becomes a human right. Therefore, unfortunately, there is no consensus on this point.

Expanding upon this topic, Alston, a preeminent scholar and practitioner of international human rights law, notes the necessity of implementing a relevant methodology to avoid the risk of overburdening the international legal system with human rights. He postulates that human rights should not only translate into legal terms as essential social concepts, but should also be structured appropriately in different legal systems and be interpreted as deriving from the UN Charter, customary law rules, or general principles of law.<sup>23</sup> He posits that:

new proposed human rights should reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems; be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law; be consistent with, but not merely repetitive of, the existing body of international human rights law; be capable of achieving a very high degree of international consensus; be compatible or at least not clearly incompatible with the general practice of states; and be sufficiently precise as to give rise to identifiable rights and obligations.<sup>24</sup>

All the human rights explicitly enshrined in international instruments meet these requirements. Hence, the applicability of each one of these criteria to the right to safe motherhood will be addressed.

Firstly, according to Alston, a new right should 'reflect a fundamentally important social value'.<sup>25</sup> As underlined by Margolin, women's lives and control over their bodies are such values.<sup>26</sup> Secondly, Alston points out that qualify as a human right, a right has to 'be relevant, inevitably to varying degrees, throughout a world of diverse value systems'.<sup>27</sup>

<sup>20</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Resolution 217 A(III).

<sup>21</sup> See for example: James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights' (2001) 101 Proceedings of the Aristotelian Society, 1-2.

<sup>22</sup> Vienna Declaration and Programme of Action (adopted 25 June 1993) World Conference on Human Rights I. 1.

<sup>23</sup> Philip Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 American Journal of International Law 607, 607-608

<sup>24</sup> *ibid* 615.

<sup>25</sup> *ibid* 615.

<sup>26</sup> Tatyana A Margolin, 'Abortion as a Human Right' (2008) 29 Women's Rights Law Reporter 77, 81.

<sup>27</sup> Alston (n 23) 615.

Pregnancy, childbirth and postpartum periods are by their very nature endemic to women's experience. In relation to safe motherhood, this second condition thus raises the question of the compatibility between universalism and the protection of female-specific rights. Several scholars are opponents of the recognition of specific rights for women, since these rights are not universal. Nonetheless, as Cook underlines, '[i]f international human rights law fails to address women's susceptibility to suffer discrimination and oppression through their inability to control the very functions that differentiate women biologically, such law fails to address half of humanity and mocks any pretensions to universality'.<sup>28</sup> Some efforts have been made in order to conciliate universality and feminism.<sup>29</sup> It is therefore arguable that women's rights and, in particular, safe motherhood meets the second of Alston's criteria.

According to Alston's third desideration, in order to qualify as a human right, a right has to derive from 'an Interpretation of UN Charter Obligations, a Reflection of Customary Law Rules or a Formulation that is Declaratory of General Principles of Law'.<sup>30</sup> In this regard, as Cook points out, human rights are enshrined in a number of international treaties.<sup>31</sup> For instance, the right to life is for example acknowledged by Article 3 UDHR, as well as Article 6(1) of the International Covenant on Civil and Political Rights<sup>32</sup> (ICCPR). Similarly, the right to health is provided by numerous international human rights tools, the most instrumental provision being Article 12 of the International Covenant on Economic and Social Rights<sup>33</sup> (ICESCR). As regards the right to an adequate standard of living, it is guaranteed in Articles 11(1) and 12(1) ICESCR. The right to safe motherhood can therefore be considered as resulting from an interpretation of the UN Charter obligations.

The fourth requirement set up by Alston in order to recognize a human right is that a new right 'be consistent with, but not merely repetitive of, the existing body of international human rights law'.<sup>34</sup> As it will be further demonstrated, the right to safe motherhood follows a particular structure and stresses the connection between several other human rights. In this regard, it is arguable that the right to safe motherhood transcends the sum of all the human rights it bridges *inter se*. It is therefore correct to consider that the right to safe motherhood meets the fourth of Alston's requirements.

The fifth requirement that Alston enunciates to establishing a new right is that this right should 'be capable of achieving a very high degree of international consensus'.<sup>35</sup> The application of this desideration to safe motherhood does not raise any difficulty. In fact, the decrease of maternal mortality is desirable in every society. If the recognition of a generic right to safe motherhood seems therefore capable of achieving an important level of consensus, some debates can, however, arise in determining which elements are encompassed by such a right.<sup>36</sup>

The sixth requirement laid out by Alston is that a new right should 'be compatible or at least not clearly incompatible with the general practice of States'.<sup>37</sup> In this regard, it is evident that reducing maternal mortality and morbidity is not clearly incompatible with the general practice of States. At the opposite, States have taken the commitment to reduce maternal

<sup>28</sup> Rebecca J Cook, *International Protection of Women's Reproductive Rights*, (1992) 24 New York University of International Law and Politics 645, 672.

<sup>29</sup> See generally para I (B) (iii) below.

<sup>30</sup> Alston (n 23) 615.

<sup>31</sup> Rebecca J Cook, 'Human Rights Law and Safe Motherhood' (1998) 5 European Journal of Health Law 357, 359-360.

<sup>32</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>33</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>34</sup> Alston (n 23) 615.

<sup>35</sup> *ibid* 615.

<sup>36</sup> As regards the recognition of a right to abortion as an element of the right to safe motherhood: see generally para 4(A) below.

<sup>37</sup> *ibid* 615.

mortality through the fifth Millennium Development Goal and, since 2015, through the third and the fifth Sustainable Development Goals.<sup>38</sup> Some States have therefore implemented measures to tackle maternal mortality, although, economic lacks remain an important obstacle to eradicate the problem.<sup>39</sup>

Moreover, *prima facie* it seems possible to sustain that female sexual mutilation is a common practice in some States. Nevertheless, traditional harmful practices are already prohibited by several other human rights, in particular the right to health. Universalism plays a major role in contributing to women's rights, in particular to safe motherhood, since it leaves no place for cultural relativism. All feminist advocates agree on the fact that not allowing a State to apply determinate human rights norms by playing the 'culture-card' exposes women to traditional harmful practices threatening their rights and their health.<sup>40</sup> The right to safe motherhood is, hence, compatible with Alston's sixth criteria.

The seventh and last of Alston's requirements is that the right 'be sufficiently precise as to give rise to identifiable rights and obligations'.<sup>41</sup> Firstly, this criterion raises the question: can socio-economic rights be considered as giving rise to identifiable rights and obligations? Several scholars criticise socio-economic rights. As an example, Cranston considers that these rights are too burdensome economically to be placed on States as legal obligations.<sup>42</sup> Others, such as Donnelly, engage with Alston's criteria and argue that they are not equally satisfied by socio-economic, and civil and political rights.<sup>43</sup> To defeat the arguments advanced by socio-economic rights detractors, one can remember that the United Nations have drafted recent discrimination-specific conventions that reaffirm socio-economic rights, in particular the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>44</sup> Secondly, the right to safe motherhood can give rise to identifiable rights and obligations. For example, access to information on reproductive health as well as maternal health care, are central elements in this regard. Safe motherhood therefore meets this last criterion.

In sum, the right to safe motherhood meets the criteria laid out by Alston and is, therefore, eligible to be recognised as a human right. This right stresses the connection between all the human rights of pregnant women and of those who have recently given birth.

## **B. The Specific Nature of the Human Right to Safe Motherhood**

In order to be effectively enforced, the human right to safe motherhood must be different from other human rights. This right has to be framed as an umbrella concept. Such a structure is similar to the child's right to development, with which the right to safe motherhood overlaps. The added value of the human right to safe motherhood would therefore lie in its ability to reflect feminist understandings of women's human rights.

<sup>38</sup> United Nations, Sustainable Development Platform <https://sustainabledevelopment.un.org/?menu=1300> (Accessed 28 September 2015).

<sup>39</sup> For a further analysis on the national measures aiming to address maternal mortality see : Development for International Development, 'Reducing Maternal Deaths: Evidence and Action' (2004) available at : <http://www.eldis.org/vfile/upload/1/document/0708/DOC17246.pdf> (Accessed 3 May 2016).

<sup>40</sup> To give but an example, see generally: Ann, Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Julie Peters and Andrea Wolper (eds), *Women's Rights Human Rights: International Feminist Perspective* (Routledge 1995) 176.

<sup>41</sup> *ibid* 615.

<sup>42</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (3<sup>rd</sup> edition, Cornell University Press 2013) 43.

<sup>43</sup> *ibid* 40-44.

<sup>44</sup> UNGA, Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

## (i) An Umbrella Concept

As Van Bueren asserts, some rights relate to an 'umbrella concept' that highlights the interrelationship between 'the fundamental survival human rights' (she mentions particularly the right to enjoy the highest attainable standard of health, nutritious food and clean water), rather than creating a new right.<sup>45</sup> The women's right to safe motherhood precisely follows this scheme and also aims at ensuring and connecting all these rights and the right to life, for women in the context of pregnancy, childbirth and lactation. It may be qualified as the 'enhancer' for all other women's rights.<sup>46</sup>

The approach adopted by the right to safe motherhood is therefore a holistic one. Moreover, a direct link between education and safe motherhood has to be established. In fact, education has a key role to play in order not only to enable women to make the informed decision to become a mother, or to breastfeed her new-borns, but also, more generally, to improve infant health.<sup>47</sup>

Cook has examined the protection of safe motherhood and asserts that it has to be advanced through several already existing human rights that fall under the umbrella of the concept.

According to this scholar the first relevant right to ensure safe motherhood is the right to life. In sum, the right to life can be invoked not only in order to ensure a pregnant woman protection against the imposition of the death penalty, but also to require a State to take positive measures and to guarantee access to appropriate health care.<sup>48</sup> Cook also mentions the rights to security and liberty of the person that can be invoked to guarantee the basic needs or survival of the pregnant women.<sup>49</sup> In the same vein, it has been acknowledged that the right to therapeutic abortion is part of 'the right to a healthy and safe motherhood'.<sup>50</sup>

As pointed out by Cook, the second category of rights that are useful to advocate for safe motherhood are the rights relating to the foundation of the family and of family life. Their guarantee should enable a woman to go through pregnancy as a result of an informed decision of founding a family.<sup>51</sup>

Cook then underlines a third category of rights relating to the highest attainable standard of health.<sup>52</sup> They include the right to benefit from nutritious food and clean water and sanitation.

Finally, Cook argues that safe motherhood can be advocated for through rights relating to equality and non-discrimination based on sex, race, age, marital status, and class of scientific progress.<sup>53</sup> These rights in particular encompass the right of women to be free from violence, which includes the protection against harmful traditional practices. Through Cook's analysis, it appears that safe motherhood is guaranteed as a result of the interlinkages between these four categories of rights. For example, she points out the main risk factors for unsafe motherhood, namely 'malnutrition of girl children resulting in anaemia, female genital mutilation, premature marriage and premature pregnancy, lack of means for child spacing

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<sup>45</sup> That is the word used by Van Bueren to analyse child's right to development See generally Geraldine Van Bueren, *International Law on the Rights of the Child* (2<sup>nd</sup> edition, Martinus Nijhoff Publishers 1998) 293-294.

<sup>46</sup> That is the word used by Van Bueren to analyse child's right to development: *ibid* 393.

<sup>47</sup> Female education impact on infant and child health has been proved: Ann M Venenan, 'Education is Key to Reducing Child Mortality – The Link Between Maternal Health and Education' (2007) XLIV UN Chronicle 58, 59.

<sup>48</sup> Rebecca J Cook, 'Human Rights Law and Safe Motherhood' (n 31), 358,360,361.

<sup>49</sup> *ibid* 361- 362.

<sup>50</sup> Paul Hunt and Tony Gray, *Maternal Mortality, Human Rights and Accountability* (Routledge 2013) 15.

<sup>51</sup> Rebecca J Cook, 'Human Rights Law and Safe Motherhood' (n 31) 362.

<sup>52</sup> *ibid* 363-364.

<sup>53</sup> *ibid* 364-366.



and, for instance, lack of emergency obstetric care'.<sup>54</sup> These risk factors are the result of violations of the above mentioned several human rights, particularly, the right to health and the right to non-discrimination. Similarly, the guarantee of maternal health derives from the right to health as well as the women's right to work, which belongs to the category of rights pertaining to discrimination. Cook's study suggests that, in the context of pregnancy, childbirth and breastfeeding, all the rights belonging to these four categories are bridged together by the right to safe motherhood.

Furthermore, the right to safe motherhood relates to an on-going process. As Cook and Undurraga assert, the right to maternal healthcare, which constitutes a central element of the right to safe motherhood, evolves in tandem with several factors, including scientific progress.<sup>55</sup> This evolving nature should allow for the filling of some remaining gaps (especially in the field of access to contraception or the protection of a decent minimum age to marry). This observation also stresses the profound link between the right to safe motherhood and peoples' right to development, enshrined in the 1986 Declaration on the Right to Development.<sup>56</sup>

In a nutshell, the right to safe motherhood bridges all the human rights that are relevant in the context of pregnancy, childbirth and lactation. By doing so, it adopts a similar structure to one followed by the child's right to development enshrined in Article 6 of the Convention on the Rights of the Child (CRC).<sup>57</sup>

#### (ii) Important Substantial Overlaps with the Child's Right to Development

First of all, it is relevant to underscore that both the right to safe motherhood and the child's right to development are closely linked with the right to health. As mentioned above, women's right to safe motherhood is part of the human right to health. Similarly, the initial Indian proposition of Article 6 CRC referred to 'the healthy development of the child'.<sup>58</sup> This bridge between the child's health and development is reaffirmed in the CRC Committee General Comment n°4 on Adolescent Health and Development.<sup>59</sup> This Comment addresses issues of particular significance to frame a human right to safe motherhood, such as adolescent pregnancies and States' duty to prevent and punish traditional harmful practices, including forced marriage.<sup>60</sup> More generally, Van Bueren also underlines that pre- and post-natal services required by Article 24(2)(d) of the CRC are relevant for the development of both adolescent mothers and infants.<sup>61</sup> This is also the case under the International Code of Marketing of Breast-milk Substitutes.<sup>62</sup> Accordingly, both the CRC drafters and the CRC Committee are concerned with the protection of safe motherhood.

Similarly, very earlier in the history of the United Nations, a former Secretary-General, Dag Hammarskjöld, emphasised States' prohibition to execute a death sentence on a

<sup>54</sup> *ibid* 365.

<sup>55</sup> Rebecca J Cook and Verónica Undurraga, 'Article 12' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 311, 315.

<sup>56</sup> Declaration on the Right to Development (adopted 4 December 1986 UNGA Resolution 41/128).

<sup>57</sup> United Nations General Assembly (UNGA), Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 United Nations Treaties Series (UNTS) 3.

<sup>58</sup> United Nations Commission on Human Rights 'Question of a Convention on the Rights of the Child/Report of the Working Group on a draft Convention on the Rights of the Child' (6 April 1988) UN Document E/CN.4/1988/28, para 14.

<sup>59</sup> CRC Committee, 'General Comment 4' (1 July 2003) UN Document CRC/GC/2003/4.

<sup>60</sup> *ibid* para 16.

<sup>61</sup> Van Bueren (n 45) 305.

<sup>62</sup> WHO, International Code of Marketing of Breast-milk Substitutes (1981).

pregnant woman.<sup>63</sup> Hodgson highlights that this position is necessary to enforce the infant's right to development.<sup>64</sup> Obviously, this prohibition is also crucial to effectively ensure safe motherhood.

Nonetheless, although infants obviously benefit from the right to safe motherhood, in particular through breastfeeding, the recipients of this right and the right to survival and development do not entirely coincide, since the latter does not cover women. One important difference between the right to safe motherhood and the child's right to development has to be mentioned however. Whereas women's right to safe motherhood includes a negative aspect, since women are free to decide whether or not they wish to become mothers, a child cannot decide not to become an adult.

Women's right to safe motherhood has therefore to be understood as an umbrella concept that accentuates the intersections between all the human rights of women in the context of pregnancy, childbirth and lactation, namely the right to life, rights relating to family life, and rights relating to the highest attainable standard of health. This concept is an evolving one that shares a similar structure with the child's right to development.

In order to be effective the umbrella concept of the right to safe motherhood must reflect a feminist approach.

### (iii) Reflect a Feminist Approach

The human right to safe motherhood must be conceived as a path towards women's empowerment.

As Byrnes notes, 'one distinctive feature of feminist research is that it generates its problematic from the perspective of women's experiences'.<sup>65</sup> Pregnancy, childbirth and postpartum periods are by their nature endemic to women's experiences. De Beauvoir notes that birth-control is a key element to achieve gender equality.<sup>66</sup>

A woman's human right to safe motherhood cannot be satisfactorily elaborated without adopting a feminist perspective. For this reason, although this right has to be shaped as an umbrella concept, it would transcend the sum of all the rights that it connects. Its added value would lie in highlighting the interlinkages between all its components, from a feminist standpoint. It is relevant thus to briefly explore how the different main feminist trends can be helpful in effectively construing a human right to safe motherhood.

Even if early feminist advocates, particularly de Gouges, tried to incorporate a gender perspective into human rights<sup>67</sup> their claims remained revolutionary until the twentieth century. At the global level, the International Bill of Human Rights contains the non-discrimination principle, especially relevant here on the grounds of sex. However, the first tool incorporating a true gender perspective was the CEDAW, adopted during the 'United Nations Decade for Women'.<sup>68</sup> During the following years, numerous feminist studies challenged the traditional male-centred views on human rights. With the slogan 'Women's

<sup>63</sup> Report of the Secretary-General, 'Annotations on the text of the draft International Covenants on Human Rights' (1 July 1955) UN Document A2929, Chapter VI, para 10. The right to safe motherhood did not have been yet acknowledged by the CEDAW Committee, nevertheless, nevertheless these annotations underline the high concern put on the protection of safe motherhood, since 1955.

<sup>64</sup> Douglas Hodgson, 'The Child's Right to Life, Survival and Development' (1994) 2 *The International Journal of Children's Rights* 369, 390.

<sup>65</sup> Andrew Byrnes, 'Women, Feminism and International Human Rights Law- Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some current issues' (1989) 12 *Australian Yearbook of International Law* 205, 209.

<sup>66</sup> See generally : Simone de Beauvoir, *Le deuxième sexe* (Gallimard 1949) I-II.

<sup>67</sup> Olympe de Gouges, *Déclaration des Droits de la Femme et de la Citoyenne* (1791) available at: <http://www.philo5.com/Mes%20lectures/GougesOlympeDe-DeclarationDroitsFemme.htm> (Accessed 14 July 2014).

<sup>68</sup> UNGA, Resolution 31/36 (16 December 1976) UN Document A/RES/31/136.

rights are human rights' becoming a true rallying cry,<sup>69</sup> feminism has expanded and divided into several factions.<sup>70</sup> The most important divide is that between liberal and radical feminists. Liberal feminists denounce the injustice suffered by women due to the violations of their rights, and emphasise the need to undertake political reform so women can make independent decisions and entirely exercise their citizenship in a liberal democracy.<sup>71</sup> Radical feminists not only reject discrimination against women, but also consider State institutions as instruments of gender oppression; moreover, they argue that all women's choices result from social constructions.<sup>72</sup>

Chinkin and Charlesworth provide a comprehensive feminist analysis of public international law by contrasting liberal and radical feminists' viewpoints. They mainly identify two levels of discrimination. Firstly, they underline that the processes of international law-making do not involve women. Secondly, they point out the androcentrism and paternalism of the norms' content. In sum, they argue that human rights, and more generally public international law, are elaborated by men, in order to serve men's own interests to the detriment of women.<sup>73</sup> The recognition of a female-centred human right to safe motherhood therefore appears as a major challenge and opportunity to effectively ensure women's human rights. This remark is confirmed since the elaboration of women specific rights, Charlesworth, Chinkin and Wright assert, is likely to lead to a marginalisation of females.<sup>74</sup>

Nevertheless, it is arguable that this last argument can be balanced. In order to fill the existing gap between the effectiveness of male and female human rights, Charlesworth, Chinkin and Wright suggest introducing a concept like gender mainstreaming, where a gender perspective is integrated into all policy areas, not just those related to women.<sup>75</sup> As Johnstone observes, this feminist claim related to gender mainstreaming was discussed at the Fourth UN World Conference on Women.<sup>76</sup> If such an approach undeniably appears as an indispensable element to protect women's rights, setting up women-specific rights must not be entirely excluded. The origin of female marginalisation may stem from women receiving extra provisions on rights pertaining to both genders. Taking into account physical differences between the genders may correct the inequalities women suffer. This would be the objective of establishing a human right to safe motherhood that aims to tackle all the types of discrimination that a woman is likely to suffer due to the fact that she is pregnant or giving birth. In other words, a human right to safe motherhood would take into account specific requirements of a pregnant woman, which are not satisfactorily guaranteed via the mere recognition of all the rights that would be connected by the human right to safe motherhood, in particular, the right to health, the right to food and the right to found a family.

Further, several feminist authors denounce the *summa divisio* between the public and private spheres. They assert that this separation has led to recognising human rights

<sup>69</sup> Charlotte Bunch 'Transforming Human Rights from a Feminist Perspective' in Julie Peters and Andrea Wolper (eds), *Women's Rights Human Rights: International Feminist Perspective* (Routledge 1995) 11, 11.

<sup>70</sup> Due to its limited length, this article cannot explore all these approaches. For a synthesis see generally: Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613.

<sup>71</sup> For an example of a liberal feminist scholar see generally: Susan Moller Okin, 'Reason and Feeling in Thinking about Justice in Feminism and Political Theory' (1989) 99 *Ethics* 229.

<sup>72</sup> For an example of a radical feminist scholar see generally: Catharine A MacKinnon, *Feminism Unmodified Discourses on Life and Law* (Harvard University Press 1987).

<sup>73</sup> See generally: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, A Feminist Analysis* (Manchester University Press 2000).

<sup>74</sup> Christine Chinkin, Shelley Wright and Hilary Charlesworth, 'Feminist Approaches to International Law: Reflections from Another Century' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 17, 23.

<sup>75</sup> *ibid* 23.

<sup>76</sup> Beijing Platform (n 11) cited by Rachael Lorna Johnstone, 'Feminist Influences on the United Nations Human Rights Treaties Bodies' (2006) 28 *Human Rights Quarterly* 148, 154.

regulating public actors' behaviours only, and erasing recognition and subsequent punishment of private actors' violations.<sup>77</sup> When framing a human right to safe motherhood, it is vital to declare a States' due diligence obligation to prevent and punish private actors' behaviours that threaten or impede safe pregnancies, such as abuses from private health agents and perpetrators of traditional harmful practices or violence against pregnant women.

Another type of feminist trend deserves to be mentioned. Third world feminist critiques emphasise the importance of broadening the analysis of women to include not only first world women, but also third world women. They hence doubly confront western traditional universal analysis on human rights.<sup>78</sup> From a broader perspective, difference feminists advocate for the protection of pluralism through the human rights framework. In this line, Brems considers that 'equality can no longer be realised by eliminating all context-related factors but rather by deliberately taking some factors into account'.<sup>79</sup> This affirmation is of great significance when tackling all forms of discrimination that can be experienced by a woman in the context of motherhood, such as discrimination rooted in sex, gender, ethnicity, poverty, disability, or religion, for instance. Nevertheless, difference feminism that largely coincides (albeit not totally) with liberal feminism has been voluntarily developed in opposition to the difference-blind Kantian universalism. Difference feminism, Lacey asserts, is based on 'a complex idea of equality which accommodates and values, whilst not fixing women's specificity as women'.<sup>80</sup>

However, if safe motherhood can only be ensured by tackling intersectional discrimination due to the fact that maternal mortality mainly affects third world women,<sup>81</sup> it still constitutes a global concern that needs to be addressed at the universal level. As mentioned above, universalism plays a key role in strengthening women's rights, since it leaves no room for cultural relativism or tolerance for traditional harmful practices that jeopardise women's health,<sup>82</sup> or ability to go through pregnancy.

It is therefore necessary to reconcile feminism and universalism. In order to do so, numerous feminist scholars have reflected upon a few suggestions. From a feminist discourse, ethics viewpoint, and especially according to Benhabib, universal and basic suppositions of communicative speech appear as core moral principles imposing the limits of a reasonable pluralism.<sup>83</sup> In the same sense, Mullaly seeks to redefine universalism in order to make it compatible with difference feminism. She notes that it is more the Eurocentric hegemonies analysed as universalism that are incompatible with feminism, rather than the concept of universalism *per se*.<sup>84</sup> Similarly, Knop demonstrates that the concept of self-

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<sup>77</sup> For example see generally: Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Stanley I Ben and Gerald F Gauss (eds), *Public and Private in Social Life* (Springer 1983) 281, Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/ Private Distinction in International Human Rights Law,' in R. Cook (ed) *Human Rights of Women*, University of Pennsylvania Press 1994) 85; Christine Chinkin, 'A Critique of the Public/Private Dimension', (1999) 10 *European Journal of International Law*, 387.

<sup>78</sup> For example, see generally: Vasuki Nesiah, 'Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship' (2003)16 *Harvard Women's Law Journal*, 189.

<sup>79</sup> Eva Brems 'Protecting the Rights of Women' in Richard Pierre Claude and Burns H Weston *Human Rights in the World Community: Issues and Action* (3<sup>rd</sup> edition, University of Pennsylvania Press 2006) 220, 223.

<sup>80</sup> Nicolas Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 4.

<sup>81</sup> WHO, 'Maternal Mortality Ratio' (2015) available at (<http://data.worldbank.org/indicator/SH.STA.MMRT>) (Accessed 6 May 2016).

<sup>82</sup> To give but an example, see generally: Mayer (n 40).

<sup>83</sup> Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Polity Press 1992) 29.

<sup>84</sup> Siobhán Mullay, *Gender, Culture and Human Rights: Reclaiming Universalism* (Hart Publishing 2006) xxxiii.

determination has to include difference-sensitive dimensions.<sup>85</sup> These ideas have to be reflected in the construction of a human right to safe motherhood that, by its nature, would target women only, while being respected, protected and fulfilled worldwide.

In a nutshell, safe motherhood is a cherished value eligible to become a human right. In order to be effective, this right would have to be structured around a gender-sensitive umbrella concept. It is now relevant to analyse whether or not this right exists in the UN legal system.

### 3. The UN Attempt to Frame a Multifaceted Right to Safe Motherhood

This part aims to assess the different initiatives taken within the UN towards ensuring safe motherhood as a multifaceted human right, in order to identify the nature and content of this right. After analysing the important role of Article 12 CEDAW in the acknowledgement of safe motherhood as a universal human right, the UN legal bodies' endeavours to take into account all aspects of women's lives, while shaping the human right to safe motherhood, will be reviewed.

#### A. Article 12 CEDAW Used as a Central Provision to Elaborate on a Right to Safe Motherhood

Article 12 CEDAW has been used as a central provision by the UN bodies, especially the Committee on the Elimination of All Forms of Discrimination against Women to elaborate a human right to safe motherhood. This provision encompasses both a guarantee of maternal health care and a reaffirmation of the right to adequate nutrition.

##### (i) The Guarantee of Maternal Health Care

The state obligation to provide maternal health care under Article 12 CEDAW is a strong requirement, one which has been reinforced by the *Alyne da Silva Pimentel v Brazil*<sup>86</sup> case.

Whereas Article 12(1) requires States to 'take all appropriate measures' to ensure access to health services 'on a basis of equality of men and women', Article 12(2) assumes that this equality induces the provision of women-specific services 'in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'. Although several important human rights documents drafted within the UN legal system explicitly cover safe motherhood,<sup>87</sup> Article 12 was the first specific provision dealing with women's health. According to Cook and Undurruga the absence of a comparable provision in the Declaration on the Elimination of Discrimination against Women<sup>88</sup> explains the undeveloped character of Article 12 CEDAW, which lacks an introductory paragraph.<sup>89</sup> CEDAW Article 12 refers to a right to access health care services rather than a right to health as such. As Tobin points out, the CEDAW Committee avoids clarifying what concretely are 'appropriate services' and prefers to recommend States to 'improve prenatal care' or to provide 'adequate prenatal

<sup>85</sup> See generally: Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University 2002).

<sup>86</sup> CEDAW Committee, *Alyne da Silva Pimentel v Brazil* (10 August 2011) UN Document CEDAW/C/49/D/17/2008.

<sup>87</sup> See: the CEDAW; the Cairo Programme (n 11); the Beijing Platform (n 11); The Millennium Development Goals available at: <http://www.undp.org/mdg/basics.shtml> (Accessed 26 March, 2014); UNGA, Resolution 60/01 (24 October, 2005) UN Document A/RES/60/1; UNGA Resolution 11/8 (the 'Maternal Mortality Resolution') (16 June 2009), UN Document A/HRC/11/LI6/Rev.I.

<sup>88</sup> UNGA, Resolution 2263 (XXII) (7 November 1967).

<sup>89</sup> Cook and Undurruga (n 55) 315.

care'. The author then stresses that the exact meaning of the adjective 'appropriate' in Article 12(2) seems rather to be interpreted by non-legal UN Bodies.<sup>90</sup>

Despite this observation, Tobin notes that this provision further develops Article 10(2) ICESCR.<sup>91</sup> This remark seems particularly pertinent in light of the CEDAW Committee General Recommendation n°24,<sup>92</sup> which constitutes a key interpretative tool for Article 12 and which contributes significantly to the recognition of safe motherhood as a human right, on at least two levels.

Firstly, it adopts a clear feminist lens<sup>93</sup> and reaffirms some obligations linked with women's health in general that are of particular relevance for safe motherhood. For example, this General Recommendation reminds States of their duty to pay particular attention to 'the rights of women belonging to vulnerable and disadvantaged groups'.<sup>94</sup> More specifically, it qualifies States' failure to provide 'certain reproductive health services for women' as a form of gender-based discrimination.<sup>95</sup>

Secondly, this General Recommendation more specifically refers to States' obligations to prevent maternal mortality, already considered as a 'human right concern'.<sup>96</sup> It specifies that, under Article 12(2), States have to report on maternal mortality rates affecting vulnerable groups of women, and the measures taken to enhance safe motherhood services aiming at tackling maternal mortality.<sup>97</sup> The CEDAW Committee takes a step further by mentioning 'women's right to safe motherhood and emergency obstetric services'.<sup>98</sup> Even through the General Recommendation is not legally binding, it clearly indicates that, according to the CEDAW Committee, safe motherhood is a human right that, albeit part of the right to health, also exists distinctively of it. The scope of Article 12 is all the more important, since no reservation has been entered to it.

Although they do not explicitly refer to safe motherhood as a human right, other UN Bodies tend to guarantee it as such. This is particularly the case of the UN Human Rights Council, which lists, in its Maternal Mortality Resolution, some measures that States have to take to tackle maternal mortality, such as the integration in their partnerships and co-operation agreements of exchanges of goods practices and the supply of technical assistance.<sup>99</sup>

Recently, in the context of the refugee crises, the CEDAW Committee indirectly reminded states of the core elements of the right to safe motherhood by stating that 'States parties are bound to uphold the rights of women and girls who are asylum seekers, refugees or stateless so that they have access to food, housing, water, sanitation, health services including sexual and reproductive services, education'.<sup>100</sup>

The CEDAW Committee confirmed States' obligations to ensure 'women's right to safe motherhood' in a further case against Brazil that deserves more comments. The *Alyne da Silva Pimentel v Brazil* (the 'Alyne Pimentel case') gave rise to the first international treaty monitoring body's decision holding a State accountable for a preventable maternal mortality

<sup>90</sup> John Tobin, *The Right to Health in International Law* (Oxford University Press 2012) 290.

<sup>91</sup> *ibid* 290.

<sup>92</sup> CEDAW Committee, 'General Recommendation 24' (1999) UN Document A/54/38/Rev.1.

<sup>93</sup> *ibid* para 12.

<sup>94</sup> *ibid* para 6.

<sup>95</sup> *ibid* para 11 and 27.

<sup>96</sup> See for example: Concluding observations ("CO") on Cambodia, CEDAW/C/KHM/CO/3 (3 February 2006) para 29-30; CEDAW Committee CO Sierra Leone (10 August 2007) CEDAW/C/SLE/CO/5, para 34-35.

<sup>97</sup> General Recommendation 24 (n 92) para 31.

<sup>98</sup> *ibid* para 27.

<sup>99</sup> Maternal Mortality Resolution (n 87) para 6.

<sup>100</sup> CEDAW Committee, Statement on the refugee crises and the protection of women and girls [adopted on 20 November 2015], available at : [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_STA\\_7845\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_7845_E.pdf) [Accessed 29 February 2016].

cause. The CEDAW Committee's decision was ruled in 2011 in a claim brought by the victim's mother. The facts occurred in 2007 and involved an Afro-Brazilian twenty-seven weeks pregnant woman who died as a result of avoidable obstetric complications related to her pregnancy, including a post-partum haemorrhage. The private clinic she turned to misdiagnosed her symptoms and delayed the tests it was supposed to perform.<sup>101</sup> They moreover declared a digestive haemorrhage as the official cause of death.<sup>102</sup>

First of all, the CEDAW Committee rejected Brazil's claim that Alyne's death was not pregnancy-related.<sup>103</sup> It then noted that Brazil has a general obligation to ensure the human right to health according to its Constitution.<sup>104</sup> The CEDAW Committee found that 'the lack of appropriate maternal health services in the State party ... clearly fails to meet the specific, distinctive health needs and interests of women'<sup>105</sup> and held subsequent breaches of the rights to health and life, as well as the non-discrimination principle. Breaches to Articles 2 and 12(1) and (2) were therefore found.<sup>106</sup>

This decision accomplishes another central advancement in the elaboration of a right to safe motherhood. It recalls the CEDAW Committee's General Recommendation n°28,<sup>107</sup> to take into account intersectional discrimination suffered by the victim on the grounds of poverty, race, gender, and the fact that she was a member of a minority group. Integrating these factors appears particularly appropriate, since maternal mortality is one of the most important causes of death among pregnant low-income Brazilian women.<sup>108</sup> The same argument is advanced by Cook, who welcomes this solution, stressing that it 'serves as a signal to domestic courts to address the systemic health inequities that many pregnant women face in the health care system'.<sup>109</sup>

This decision hence not only sets out Brazil's obligation to financially compensate the victim, but also clearly enunciates a 'women's right to safe motherhood and affordable access for all women to adequate emergency obstetric care'.<sup>110</sup> This women's right to safe motherhood '[p]rovide[s] adequate professional training for health workers'.<sup>111</sup> The CEDAW Committee therefore confirms 'women's right to safe motherhood' mentioned in General Recommendation n°24. This emerging right induces, *inter alia*, a due diligence obligation of preventing and eliminating private entities' behaviours that jeopardise safe motherhood.<sup>112</sup>

As regards the nature of the obligations deriving from Article 12, even though several scholars have postulated they are immediate in nature,<sup>113</sup> the CEDAW Committee does not go so far, since it directly states that maternal health care services have to be provided to 'the maximum extent of available resources',<sup>114</sup> which is an expression traditionally used to enunciate progressive obligations.

In addition, the CEDAW Committee does not provide any guidance on the meaning of the expression 'when necessary' contained in Article 12(2). Nonetheless, as Tobins argues, 'its views tend to suggest that this threshold will be satisfied where the relevant maternal

<sup>101</sup> *Alyne Pimentel* case (n 86) para 2.2 – 2.5, 3.5.

<sup>102</sup> *ibid* para 2.12.

<sup>103</sup> *ibid* para 7.3.

<sup>104</sup> *ibid* para 4.3.

<sup>105</sup> *ibid* 7.6.

<sup>106</sup> *ibid* 7.6.

<sup>107</sup> *ibid* para 7.6.

<sup>108</sup> Centre for Reproductive Rights, 'Statement to ECOSOC : Maternal Mortality and the MDGs' (9 January 2010) available at <http://www.reproductiverights.org/press-room/statement-to-ecosoc-maternal-mortality-and-the-mdgs> (Accessed 8 May 2016).

<sup>109</sup> Rebecca J Cook, 'Human Rights and Maternal Health : Exploring the Effectiveness of the *Alyne* Decision' (2013) *Global Health and the Law* 103, 116.

<sup>110</sup> *Alyne Pimentel* case (n 86) para 8.2.

<sup>111</sup> *ibid* para 8.2.

<sup>112</sup> *ibid* para 7.5.

<sup>113</sup> Cook and Undurraga (n 55)329.

<sup>114</sup> *ibid* para 7.3.

health services are reasonably necessary to prevent any genuine and real threats to the life of a mother'.<sup>115</sup>

The *Alyne Pimentel* case accordingly constitutes a true landmark decision in acknowledging safe motherhood as a human right that, although it constitutes a part of the right to health, also has its own existence apart from it. The scope of this case is all the more important now that some national courts have adopted similar decisions.<sup>116</sup>

## (ii) The Reaffirmation of the Right to Adequate Nutrition

As aforementioned, Article 12 ensures women the right to 'adequate nutrition during pregnancy and lactation'.

This sentence is but a reaffirmation of the right to an adequate standard of living contained in Articles 11(1) and 12(1) ICESCR. In this regard, it is relevant to underline that Article 11 ICESCR conceives of the right to food not only as an element of the right to an adequate standard of living, in 11(1), but also, in 11(2), as a 'fundamental right' to be free from hunger. If some scholars, such as Craven, underline that this adjective does not have any legal concrete consequence, others, including Niada, adopt a different perspective and put equal emphasis on the importance of each one of the two components. For example, and of great significance for my argument, Niada notes that infants of undernourished women will, then, themselves suffer underfeeding and that inadequate nutrition has particularly adverse effects on pregnant or breastfeeding women.<sup>117</sup> Narula asserts that the right to food may be defined as 'the right to be free from hunger and to have sustainable access to food in a quantity and quality sufficient to satisfy one's dietary and cultural needs'.<sup>118</sup>

In this context, Article 12 CEDAW merely reaffirms women's right to adequate nutrition, since as Van Esterik underscores, '[w]omen are entitled to full human rights because they are human, not because they are mothers'.<sup>119</sup> This observation certainly explains the bare, if not inexistent, CEDAW Committee comments on pregnant and breastfeeding women's adequate nutrition. For example, this point is not mentioned in the aforementioned General Recommendation n°24.

Nevertheless, this reaffirmation has an important symbolic scope, due to the fact that women are more likely to suffer food-related discrimination than men, while the nutritional needs of pregnant and breastfeeding women are particularly high.<sup>120</sup> Furthermore, State obligations to respect and fulfil the right to food should enable women to breastfeed their infants. Accordingly, it may be argued that women's right to breastfeed their infants is contained indirectly in Article 12(2). States therefore should provide women with education on lactation, in order to enable them to make an informed choice in this regard. The Consultation on Human Rights and Infants Nutrition confirms this provision stating that '[I]nfants have the right to be breast-fed, in the sense that no one may interfere with women's

<sup>115</sup> Tobin (n 90) 289.

<sup>116</sup> For a significative example: *Laxmi Mandal v Deen Dayal Haringar Hospital*; and *Jaitun v Maternity Home*, MCD, MANU/DE/1268/2010, cases WP(C) 8853/2008 and 10700/2009 (High Court of Delhi) judgment on 4 June 2010. The High Court of Delhi points out the 'complete failure of the implementation of the [assistance] measures' in the context of the access to maternal health care. It therefore urges States and Federal governments to take appropriate measures. For a commentary see: Jameen Kaur, 'The Role of Litigation in Ensuring Women's Reproductive Rights: an Analysis of the Shanti Devi Judgment in India' (2012) 39 *Reproductive Health Matters* 21.

<sup>117</sup> Laura Niada, 'Hunger and International Law: The Far-reaching Scope of the Human Right to Food' (2006) 22 *Connecticut Journal of International Law* 131, 131-132.

<sup>118</sup> Smita Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691, 694.

<sup>119</sup> Penny Van Esterik, 'Right to Food; Right to Feed; Right to Be Fed. The Intersection of Women's Rights and the Right to Food' (1999) 16 *Agriculture and Human Values* 225, 227.

<sup>120</sup> *ibid* 227.



right to breastfeed them'.<sup>121</sup> This right obviously also includes a negative aspect: the women's right not to breastfeed their babies. Kent argues that even the principle of 'best interest of the child' embedded in Article 3 of the CRC, cannot interfere with this right.<sup>122</sup> In other words, the babies' right to be breastfed arises from the decision of their mother to breastfeed them. By contrast, the right of babies to be breastfed does not exist, if their mother decides not to do so. Although this balance between the child's right to development and the women's right to safe motherhood stresses the importance of this last right, there is no precedence of the right to safe motherhood over the best interest of the child. This articulation between the women's right to choose to breastfeed their babies or not and the babies' right to be breastfed rather results from the fact that mother and baby are often considered as 'a dyad having a type of groups rights'.<sup>123</sup>

The CEDAW Committee therefore acknowledges the existence of 'women's right to safe motherhood' considering the provisions of maternal health care services as the core of this right. Nevertheless, such a right has to be understood as a holistic concept. To determine whether or not it exists, beyond its formal recognition, it is relevant to refer to the UN endeavour to make safe motherhood compatible with all aspects of a woman's life.

### **B. The Endeavour to Take into Account all Aspects of Women's Lives While Guaranteeing Safe Motherhood**

The UN has developed a human rights framework allowing a woman to become a mother developing both her professional and family life.

#### (i) The Conciliation between Safe Motherhood and Women's Effective Right to Work

Since its creation in 1919, the International Labour Organization has protected maternity leave, which was therefore the first aspect of safe motherhood to be guaranteed at the UN level.<sup>124</sup> In addition, in order to ensure women's effective right to work, Article 11(2) CEDAW establishes the State obligation to take appropriate measures in order to prevent all forms of discrimination that a woman is likely to suffer on the grounds of her status as wife and/or mother, in her professional life. This article then lists some of the measures required, including the prohibition of 'dismissals on the grounds of pregnancy or of maternity leave' in paragraph a, 'the introduction of maternity leave with pay or with comparable social benefits without loss of former employment' in paragraph b, and the 'protection during pregnancy in types of work proved to be harmful to them'. As regards the admission of women at work, the aforementioned CEDAW Committee General Recommendation n°24 stresses the prohibition of mandatory pregnancy tests.<sup>125</sup> Furthermore, it is of great significance to observe that women's right to enjoy a maternity leave is a dynamic concept. The examples in this sense are numerous, and two recent ones deserve more attention.

Firstly, the minimal length of maternity leave has been increased from four weeks in 1919 to fourteen since 2000. Secondly, the CEDAW Committee delivers a particularly protective interpretation of Article 11(2)(b) as is reflected by its recent decision in *Elisabeth de Blok et al v The Netherlands*.<sup>126</sup> The complaint was submitted in November 2011 by a group of Dutch self-employed women who did not receive any benefit during their maternity

<sup>121</sup> Consultation on Human Rights and Infants Nutrition cited in George Kent, *Freedom from Want: the Human Right to Adequate Food* (Georgetown University Press 2005) 166.

<sup>122</sup> George Kent (n 121) 166.

<sup>123</sup> *ibid* 171.

<sup>124</sup> ILO, Maternity Protection Convention (n°3) (adopted 29 November 1919, entered into force 13 June 1921).

<sup>125</sup> General Recommendation 24 (n 92), para 22.

<sup>126</sup> CEDAW Committee, *Elisabeth de Blok et al v The Netherlands* (18 March 2014) UN Document CEDAW/C/57/D/36/2012.

leave, consequent to a change in their national law. In 2004, a formerly existing public mechanism providing pay to self-employed women during maternity leave was removed and no other dispositive providing adequate alternatives for these women was put in place. The CEDAW Committee considered this change a breach of Article 11(2)(b).<sup>127</sup>

The *Elisabeth de Blok* case underlines at least two important elements. First, Article 11(2)(b) obliges States not only to prevent and punish abuses committed by private actors, but also to create public schemes in order to guarantee all women paid maternity leave or equivalent. Second, even if many breaches of the right to safe motherhood, including the right to paid maternity leave, occur in developing countries, this is a universal concern that also deserves the attention of developed countries.

Ensuring women their effective right to work also constitutes a crucial element to empower women, putting an end to what Cook expresses as ‘the financial need to be sexually available to men’.<sup>128</sup> An effective right to safe motherhood should include the freedom to become pregnant as the result of a personal choice of founding a family. The UN has developed a legal framework in this sense that is convenient to analyse in order assess the effectiveness of the ‘women’s right to safe motherhood’.

#### (ii) Motherhood as an Informed Decision to Found a Family

Article 12(1) CEDAW clearly states that women have to be provided with ‘access to health care services, including those related to family planning’. As mentioned above, the Cairo programme has completed this provision considering the moment and frequency of reproduction as a free choice. Additionally, the Beijing Platform enunciates ‘the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health’.<sup>129</sup> Similarly, in its General Recommendation 24, the CEDAW Committee enunciates that women should be able to ‘freely space the number of their children’.<sup>130</sup>

All these statements make clear that States have to take positive actions in order to let men and women make the informed choice of having a baby. The CEDAW Committee specifies that such actions must include education on sexual and reproductive health for adolescents,<sup>131</sup> as well as the possibility for a woman to obtain contraceptives without her spouse or partner’s consent.<sup>132</sup> In its 2007 Concluding observations on Mauritania, the CEDAW Committee considered access to emergency contraception as a women’s right.<sup>133</sup> More generally, confidentiality has to be protected,<sup>134</sup> since, as Cook argues, it constitutes an important part of the human right to security.<sup>135</sup>

Such provisions are of particular relevance since, as shown by Wickstrom and Jacobstein, there is a direct link between the availability of contraceptive methods and the risk of maternal mortality faced by women. Nevertheless, in practice, if access to contraception has significantly increased, it is not still universally *de facto* guaranteed. For instance, only 17 per cent of women in Africa use a contraceptive.<sup>136</sup>

<sup>127</sup> *ibid* para 8.8.

<sup>128</sup> Rebecca J Cook and Bernard M Dickens, ‘Ethical and Legal Issues in Reproductive Health: Human Rights to Safe Motherhood’, (2002) 76 *International Journal of Gynecology and Obstetrics* 222, 229.

<sup>129</sup> Beijing Platform (n 11) para 95.

<sup>130</sup> General Recommendation 24 (n 92) para 28.

<sup>131</sup> *ibid* para 23.

<sup>132</sup> *ibid* para 14.

<sup>133</sup> CEDAW Committee, CO Mauritania (11 June 2007) CEDAW/C/MRT/CO/1, para 41-42.

<sup>134</sup> General Recommendation 24 (n 92) para 22.

<sup>135</sup> Cook, ‘Human Rights Law and Safe Motherhood’ (n 31), 36.

<sup>136</sup> Jane Wickstrom and Joy Jacobstein, ‘Contraceptive Security: Incomplete Without Long-Acting and Permanent Methods for Family Planning’ (2011) 42 *Studies in Family Planning*, 291, 292.

Furthermore, women's right to safe motherhood is closely interrelated with the right to marry, and the surrounding issues of minimal age and free consent. Firstly, the right to marry can allow women to exercise self-determination to found a family in the way they wish. In its General Recommendation 21, the CEDAW Committee specifies that '[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'.<sup>137</sup> The Committee also acknowledges the situation of women living in *de facto* unions.<sup>138</sup> In sum, it reaffirms that women should be free to decide the form of family they wish to create.

By contrast, adolescent females and victims of early or forced marriages are particularly exposed to unsafe motherhood as well as other kind of adverse effects on their health. Within the UN legal system, the right to marry was first established by Article 16 UDHR and a Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was adopted in 1962.<sup>139</sup> Nevertheless, the scope of this Convention remains extremely limited, since only fifty-five States have ratified it. The right to marry is reaffirmed in the ICCPR, the CRC and in Article 16 CEDAW. If all these provisions place on States an obligation to fix a minimum age to marry, no concrete age is mentioned. On the one hand, determining the minimum age for marriage at a global level would certainly have infringed on national sovereignties. On the other hand, such a position does not impede abuses. The fact that, in Iran, over 40, 000 girls under age 14 are married each year<sup>140</sup> is particularly illustrative of the dangers deriving from the absence of a clear minimum age embedded in international binding provisions. Accordingly, despite the development of these provisions, the protection granted seems to remain largely theoretical and the figures are alarming. For instance, 42 per cent of females in Africa between 15 and 24 were married before they reached 18 years.<sup>141</sup>

According to Article (2)(f) CEDAW, women are entitled to be free from violence. This is a particularly important provision, since beyond physical violence, some practices can lead to unsafe motherhood. This is not only the case of forced or early marriages, but also of dietary restrictions and female genital mutilation, forced abortion and sterilisation.<sup>142</sup>

If traditional harmful practices jeopardise the health of women before, during and after childbirth, the UN legal system tends to tackle these forms of violence. In order to do so, States should not only provide maternal healthcare services but also facilitate the compatibility between safe motherhood and women's professional and personal lives. As a result, it may be asserted that the UN legal system has framed a right to safe motherhood, one which refers to an evolving holistic concept comparable to the child's right to development.

The UN legal system has therefore framed women's human right to safe motherhood. It is acknowledged by the CEDAW Committee, while other UN Bodies ensure it indirectly. While the essential core of the right to safe motherhood is maternal health care, a number of UN legal bodies' initiatives go further and consider all the aspects of a woman's life to frame this right. Nonetheless, this right still remains incomplete, at least from a feminist standpoint, since elements that have to be conceived as central attributes of this right are not universally guaranteed.

<sup>137</sup> CEDAW Committee, 'General Recommendation 21' (1994) UN Document A/49/38, para 16.

<sup>138</sup> *ibid*, para 18.

<sup>139</sup> UNGA, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964).

<sup>140</sup> International Campaign for Human Rights in Iran, 'Over 40,000 girls under age 14 married each year in Iran' (4 September 2015) available at: <https://www.iranhumanrights.org/2015/09/child-marriage/> (Accessed 6 May 2016).

<sup>141</sup> UNICEF, *Early Marriage: A Harmful Traditional Practice* (2005).

<sup>142</sup> For example, see generally: CEDAW Committee, 'General Recommendation 19' (1992) UN Document A/47/38.

#### 4. The Need to Universally Strengthen Central Attributes of the Right to Safe Motherhood

If the interests of the foetus and then of the baby often coincide with the mother's, sometimes they can be in tension or conflict,<sup>143</sup> and a balance has to be found. Two major issues are particularly illustrative of this conflict and are not still fully addressed by the UN legal system in order to help women both go safely through pregnancy as the result of an informed choice, and through childbirth by having a healthy infant. Firstly, the guarantee of access to abortion has to be reinforced. Secondly, a more important framework has to surround the protection against mother-foetus/baby HIV transmission.

##### A. *Extending Access to Legal Abortion*

Whereas, under international law, women are currently supposed to benefit from a right to therapeutic abortion and to abortion when the pregnancy results from a rape, no general access to abortion is guaranteed. This is regrettable because it is an important element to effectively ensure for women their freedom of self-determination, and subsequently their human right to safe motherhood.

(i) Current situation in International Law: a Right to Therapeutic Abortion and a Right to Abortion after Rape

In order to understand properly how the right to therapeutic abortion has been protected within the UN legal system, I take a national case study and examine the consequences and implications. The example taken here is the abortion crisis in Peru. In the section following, the most illustrative UN Bodies' initiatives that aim to ensure women therapeutic abortion and abortion after rape will be examined.

##### *Jurisprudence and Observations related to the 'Abortion Crisis in Peru'*<sup>144</sup>

Peruvian law prohibits abortion under the Criminal Code unless it is vital or absolutely necessary for the pregnant woman to avoid severe and permanent damage to her health.<sup>145</sup> Moreover, no abortion is permitted for the termination of a pregnancy occurring after a rape or in case of foetus unviability.<sup>146</sup> As noted by Huff, 'the absence of clear regulations to ensure access to abortion services often 'leave women at the mercy of public officials'.<sup>147</sup> Clandestine

<sup>143</sup> The articulation between the mother's right to choose to breastfeed her baby or not and the baby's right to be breastfed is a first example of these possible tensions or conflicts. On this point see generally para 2(B)(i) above.

<sup>144</sup> Expression borrowed from: Sarah A Huff, 'The Abortion Crisis in Peru: Finding a Woman's Right to Obtain Safe and Legal Abortion in the Convention on the Elimination of All Forms of Discrimination Against Women' (2007) 30 Boston College International and Comparative Law Review 237.

<sup>145</sup> United Nations Economic and Social Council, 'Implementation of the International Covenant on Economic, Social and Cultural Rights' (17 June 1996) UN Document E/1990/5/Add.29, para 56.

<sup>146</sup> Articles 114 – 120 of the Peruvian Criminal Code available at : <http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-codpenal.htm&vid=Ciclope:CLPdemo> (Accessed 27 April 2016). It is noteworthy that the debate of legalising access to abortion after rape has been recently debated by the Peruvian Parliament: Perú 21, 'Comisión de Constitución Archivó Proyecto para Despenalizar Aborto en Caso de Violación' (24 November 2015) available at : <http://peru21.pe/politica/comision-constitucion-inicio-debate-despenalizar-aborto-casos-violacion-2232859> (Accessed 27 April 2016).

<sup>147</sup> Huff (n 144) 239 citing Luisa Cabal et al., 'What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?' (2003) 51 Health and Human Rights, 69-70.

abortions constitute a second-class criminal offence according to the 1991 Peruvian Criminal Code.

In its 1996 Concluding Observations on Peru, the Human Rights Committee (HRC) expressed its concern stating ‘that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality’.<sup>148</sup> It accordingly required Peru to oblige the medical profession to ensure that women have access to safe abortion services when permitted by law. The HRC also urged Peru to consider a national law reform in order to fulfil its international obligations related to women’s health and dignity. Despite these Concluding Observations the problem was not solved and gave rise to two individual complaints before UN treaty monitoring mechanisms.

The *K.L. v Peru* case brought before the HRC was the first case in which a UN treaty monitoring mechanism held a State accountable for the denial of a therapeutic abortion.<sup>149</sup> The facts involved a seventeen-year-old and fourteen weeks pregnant Peruvian adolescent who carried an anencephalic foetus that had no chance to survive.<sup>150</sup> As mentioned above, domestic abortion ban exceptions allowed her, in theory, to benefit from a therapeutic abortion. Nevertheless, she was denied a therapeutic abortion by health officers.<sup>151</sup> She was thus forced to continue her pregnancy and to give birth to a baby that she had to breastfeed before its decease, four days later.<sup>152</sup> As a result of her pregnancy and childbirth, she suffered psychological trauma as well as a major vulva infection. Considering that the hospital denial to let K.L. access an abortion resulted in ‘further pain and distress’<sup>153</sup> experienced by the girl, the Committee found a breach by Peru of Article 7 of the ICCPR, which enunciates the right to be free from torture or cruel, inhuman or degrading treatment.<sup>154</sup> In its 2011 Concluding Observations on Peru, the Committee against Torture endorsed this conclusion.<sup>155</sup>

Similarly in 2011, the CEDAW Committee issued its decision in the case *L.C. v Peru*<sup>156</sup> involving a thirteen-year-old adolescent repeatedly raped by a neighbour, between 2006 and 2007. She discovered she was pregnant but told no one and consequently suffered from a prolonged period of depression.<sup>157</sup> She tried in vain to commit suicide by jumping off a roof.<sup>158</sup> At the hospital, despite the doctors acknowledging the necessity to removing her spinal column in order to enhance her chance to have physical mobility, they refused to do so due to the fact that surgery was likely to jeopardise her pregnancy.<sup>159</sup> The hospital then denied her a therapeutic abortion, even though, once again, she was covered by abortion ban exceptions enshrined in the Peruvian Criminal Code. She additionally was not able to appeal the decision, and subsequently became a quadriplegic. The CEDAW Committee found that the refusal to provide L.C. with a therapeutic abortion constituted discrimination prohibited by Article 12 CEDAW.<sup>160</sup> Furthermore, the CEDAW Committee considered the denial of both abortion and surgery as breaches of Article 5 of the CEDAW related to sex-stereotypes. In this regard, the Committee asserts that ‘the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the

<sup>148</sup> HRC, Concluding Observations on Peru (18 November 1996) UN Document CCPR/C/79/add.72, para 15.

<sup>149</sup> HRC, *K.L. v Peru* (22 November 2005) UN Document CCPR/C/85/D/ 1153/2003.

<sup>150</sup> *ibid* para 2.2., 2.4. and 2.5.

<sup>151</sup> *ibid* para 2.3.

<sup>152</sup> *ibid* para 2.6.

<sup>153</sup> *ibid* para 3.4.

<sup>154</sup> *ibid* para 6.3.

<sup>155</sup> Committee Against Torture, CO on Peru (16 May 2006) UN Document CAT/C/PER/CO/4, para 23.

<sup>156</sup> CEDAW Committee, *L.C. v Peru* (4 November 2011) CEDAW/C/50/D/22/2009. For a first comment see: Ngwena C, ‘Commentary on *LC v. Peru*: the CEDAW Committee First Decision on Abortion (2013) 57 *Journal of African Law* 310.

<sup>157</sup> *L.C. v Peru* (n 156), para 2.1.

<sup>158</sup> *ibid* para 2.1.

<sup>159</sup> *ibid* para 2.2. – 2.6.

<sup>160</sup> *ibid*, para 8.15.

mother'.<sup>161</sup> The CEDAW Committee further stated that the impossibility of appealing the decision was a breach of L.C.'s right to an effective remedy.<sup>162</sup> It therefore recommended Peru to 'establish a mechanism for effective access to therapeutic abortion',<sup>163</sup> as well as to 'review its legislation with a view to decriminalising abortion when the pregnancy results from rape or sexual abuse'.<sup>164</sup>

Although a national protocol to the abortion procedure was adopted on 28 June 2014, this protocol still does not allow abortion in the context of a pregnancy resulting from rape.<sup>165</sup> The problem is therefore not solved, and the CEDAW Committee expressed again its concern about this protocol.<sup>166</sup> Moreover, the UN Bodies have largely reaffirmed their position aiming at ensuring that therapeutic abortions and abortions following a rape are women's human right, rather than more generally.

#### *Endorsement by other UN Bodies*

Women's right to resort to a therapeutic abortion or the termination of a pregnancy originating from rape has been acknowledged by UN Bodies, beyond the treaty monitoring Committees. In its Article 7(1), the 1998 Rome Statute of the International Criminal Court qualified 'forced pregnancy' as a crime against humanity 'when committed as part of a widespread or systematic attack directed against any civilian population'.<sup>167</sup>

Moreover, even prior to the 'abortion crisis' in Peru, treaty monitoring mechanisms had already expressed their concern about abortion restrictive laws.<sup>168</sup> The two aforementioned decisions regarding therapeutic abortion were then reaffirmed with insistence by all the relevant UN Bodies. For example, in its recent Reports both the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment<sup>169</sup> and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health<sup>170</sup> expressed their concerns surrounding these issues. While the first stresses that absolute prohibition of abortion is a breach of every one's right to be free from torture and ill-treatment,<sup>171</sup> the second underscores that States often establish barriers to access to abortion that are discriminatory in nature and lie at the origin of a breach of human dignity.<sup>172</sup> It seems relevant to point out that the right to therapeutic abortion is therefore the subject of consensus, beyond the feminist or non-feminist vein of the body examining it.

All these UN Bodies statements have been taken into account and resulted in some domestic law reforms. For example, in Argentina a Court ruled that Article 12 implies the suppression of the requirement of court authorizations for therapeutic abortions, when they are

<sup>161</sup> *ibid* para 8.15.

<sup>162</sup> *ibid* para 8.16.

<sup>163</sup> *ibid* para 12.

<sup>164</sup> *ibid* para 12.

<sup>165</sup> Available at <http://www.larepublica.pe/29-06-2014/el-aborto-terapeutico-no-se-aplicara-en-casos-de-abuso-sexual> (Accessed 27 July 2014).

<sup>166</sup> CEDAW, Press Release, 25 July 2014 available at: <http://reproductiverights.org/en/press-room/united-nations-calls-on-peru-to-expand-access-to-legal-abortion> (Accessed 27 July 2014).

<sup>167</sup> UNGA, Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010) UN Document A/CONF.183/9.

<sup>168</sup> See for example: HRC, CO on Mauritius (31 May 1995,) UN Document A/50/38, para 196.

<sup>169</sup> UNCHR, 'Report of the Special Rapporteur on Torture' (1 February 2013) UN Document A/HRC/22/53, para 50.

<sup>170</sup> See generally: UNGA, 'Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (3 August 2011) UN Document A/66/264.

<sup>171</sup> UNCHR, 'Report of the Special Rapporteur on Torture' (n 169).

<sup>172</sup> UNGA, 'Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (n 170).

legal to protect women's health.<sup>173</sup> In the same vein, the last Universal Periodic Review of Chile has had important consequences as regards the acknowledgement of therapeutic abortion and abortion after a sexual assault. Although, until 2014, Chile banned abortion in its entirety without exception, it made the commitment to legalise abortion for therapeutic reasons, or after rape-related pregnancy, at the end of its last Universal Periodic Review.<sup>174</sup> This commitment has already been translated into legal terms, since therapeutic abortion has been acknowledged and the law on abortion after rape was adopted by the Parliament in September 2015.<sup>175</sup>

Conversely, in El Salvador a long and regrettable delay is observable since even spontaneous abortions are prohibited. In other words, women are regularly jailed for miscarriages or for having given birth to stillborn babies.<sup>176</sup> This prohibition endangers not only women's health and lives, but also their right to have a family live.<sup>177</sup> It therefore appears as a major breach of the right to safe motherhood that the UN Bodies have to tackle.

In Europe, the effectiveness of the UN bodies' work is reinforced by the position adopted by the European Court of Human Rights.<sup>178</sup> However, the Irish case is another specific scenario that deserves more analytical attention. In Ireland, the Protection of Life During Pregnancy Act 2013 entered into force on the 1st of January, 2014.<sup>179</sup> It must be noted that this is a crucial first step, even if rape is still not taken into account as a reason for legal abortion.<sup>180</sup> Moreover, Chile's acceptance of the need for law reform after the Universal Periodic Review should have a considerable impact on the question regarding abortion legislation in this Andean country.

## (ii) Legalisation of Abortion in General as a Crucial Challenge Facing the UN

The legalisation of abortion in general constitutes a big challenge for the UN system: on the one hand, the right to abortion would have to be considered as a component of the human right to safe motherhood, while on the other, many obstacles remain and impede, at present, a universal recognition of a general right to abortion.

### *Existing Obstacles to an International Recognition of Abortion*

Traditions, in particular religions, are often the main barriers to the social acceptance of abortion. For instance, the Egyptian Criminal Code enshrines Sharia law and provides that

<sup>173</sup> Juzgado de Instrucción San Carlos de Bariloche, Argentina, NRF s/abuso sexual. Incidente de solicitud de interrupción de embarazo formulado por TN (05/04/2010) II para VIII and X.

<sup>174</sup> UN Human Rights Council, Report on the Working Group on the Universal Periodic Review: Chile (advanced version only available in Spanish), (2 April 2014) UN Document A/HRC/26/5, 5.

<sup>175</sup> El País, 'Chile Aprueba Despenalizar el Aborto en Caso de Violación' (16 September 2015) available at:

[http://internacional.elpais.com/internacional/2015/09/16/actualidad/1442423251\\_854920.html](http://internacional.elpais.com/internacional/2015/09/16/actualidad/1442423251_854920.html)

(Accessed 22 September 2015).

<sup>176</sup> For a recent example, see generally: Amnesty International, 'Encarceladas en el Salvador por Perder su Embarazo' (6 May 2016) available at: <http://www.amnistia.org/profiles/blogs/encarceladas-en-el-salvador-por-perder-su-embarazo> (Accessed 7 May 2016).

<sup>177</sup> Amnesty International, 'El Salvador: Familias Separadas, Abrazos Rotos: Mujeres Encarceladas por Emergencias Obstétricas y el Impacto en sus Familias' report n°AMR 29/2873/2015 (30 November 2015) available at: <https://www.amnesty.org/es/documents/amr29/2873/2015/es/> (Accessed 6 May 2016).

<sup>178</sup> See for example: ECHR, *R.R. v. Poland*, Application No. 27617/04 (2011), para 159.

<sup>179</sup> Protection of Life During Pregnancy Act 2013 (number 35 of 2013) available at: <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf> (Accessed 1 October 2015).

<sup>180</sup> *ibid.*

abortion may be punished by a jail sentence or hard labour.<sup>181</sup> Similarly, the Catholic Church opposes abortion in its entirety.<sup>182</sup> As an example, in Chile, the Catholic Church advanced the right to life, in order to struggle with the depenalisation of abortion, although, as mentioned above, access to abortion has been limited to abortion for therapeutic reasons or after rape-related pregnancies.<sup>183</sup> Moreover, the changes in Governments' political complexions play an important role in the debate over legalising abortion. In this regard, some States have taken a step back and have restricted access to abortion after having legalised it. This is specifically the case in Spain where, in September 2015, after numerous debates, the Parliament adopted a Law that requires adolescent girls to have their parents' permission in order to access an abortion.<sup>184</sup>

According to Margolin, these cultural and political considerations have led the UN treaty bodies to avoid abortion-related issues and to defer to Member States' laws.<sup>185</sup> This argument may be sustained given the ambiguousness of Article 1 of the CRC, which states that child means every human being below the age of eighteen without explicitly specifying if the beginning of life is at conception or at birth.<sup>186</sup> As a consequence of the apparent neutrality of this Article, some scholars actively argue for the existence of foetus' rights, and assert that States, which have entitled women to abort, infringe 'the purposes and principles of the UN'.<sup>187</sup> However, Zampas and Gher argue that, since 1948, given that Article 3 of the UDHR provides the right to life for the human being that has been 'born', this argument is not correct.<sup>188</sup> In other words, if a baby benefits from the international protection of human rights law, this is not the case for a foetus, which is not born, and therefore cannot be considered as a human being.

Leaving abortion-related issues to States has adverse effects on the protection of women's rights. As Cook points out, 'States have employed laws to hold women captive to their reproductive functions, their own bodies and sexual availability to men'.<sup>189</sup> The recognition of an international right to abortion hence appears as a condition to guarantee safe motherhood.

Nevertheless, Cook's critique can be extended to the international process of elaboration of human rights more generally. In the context of access to abortion, the establishment of a State's responsibility for private actors violating human rights (i.e. a due diligence obligation) seems particularly relevant. In fact, even in the countries where general abortion is legal,

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<sup>181</sup> Rebecca L Hillock, 'Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?' (2005) *Tulsa Journal of Comparative and International Law* 481, 493.

<sup>182</sup> F W Saunders, 'The Catholic Church and Abortion' available at: <http://www.catholicnewsagency.com/resources/abortion/catholic-teaching/the-catholic-church-and-abortion/> (Accessed 28 April 2016).

<sup>183</sup> Obispos de la Conferencia Episcopal de Chile, 'El Derecho Humano a la Vida, a una Vida Digna para Toda Persona' (23 March 2015) [http://documentos.iglesia.cl/conf/documentos\\_sini.ficha.php?mod=documentos\\_sini&id=4356](http://documentos.iglesia.cl/conf/documentos_sini.ficha.php?mod=documentos_sini&id=4356) (Accessed 1st October 2015).

<sup>184</sup> Fernando Garrea, 'La ley de aborto culmina su trámite con fugas de voto' (10 September 2015) *El País* [http://politica.elpais.com/politica/2015/09/09/actualidad/1441829678\\_455171.html](http://politica.elpais.com/politica/2015/09/09/actualidad/1441829678_455171.html) (Accessed 23 September 2015).

<sup>185</sup> Margolin (n 26) 78. It is noteworthy that a similar position has been adopted by the ECHR, that employs the doctrine known as the 'margin of appreciation' to leave abortion cases to national jurisdictions. For more precisions see for example: Nathalie Klashtorny, 'Ireland's Abortion Law: an Abuse of International Law' (1996) 10 *Temple International and Comparative Law Journal* 481, 490.

<sup>186</sup> Van Bueren (n 45) 33.

<sup>187</sup> Rita Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff Publishers 2009) 77.

<sup>188</sup> Christina Zampas and Jaime R Gher, 'Abortion as a Human Right – International and Regional Standards' (2008) 8 *Human Rights Law Review* 249, 263.

<sup>189</sup> Rebecca J Cook, *International Protection of Women's Reproductive Rights* (n 28) 655.



health practitioners may continue to deny women this right.<sup>190</sup> Although clinics and hospitals claim that they have the right to deny abortion as a matter of freedom of religion, this is not acceptable, given the fact that these institutions are artificial legal persons that do not benefit from the right to freedom of religion.<sup>191</sup>

The persistence of obstacles to an international acknowledgement of generally available abortion is all the more regrettable given that abortion must be seen as a central attribute of women's human right to safe motherhood, as discussed below.

*The Right to Abortion as an indispensable component of the Human Right to Safe Motherhood*

In order to fully ensure women their right to reproductive self-determination, it is necessary to oblige States, through international human rights tools, to generally legalise abortion. Access to abortion also constitutes an important element to enable women to participate equally with men in society. In sum, access to abortion is a *sine qua non* condition to achieve gender equality.<sup>192</sup>

The adverse effects of abortion bans on women's health have been well proven. Every year, around 47,000 women die due to unsafe abortion complications.<sup>193</sup> Moreover, the HRC's 1998 Concluding Observations on Ecuador emphasised the correlation between the restrictions on abortion and the significant rate of suicide among adolescent girls.<sup>194</sup> The legalisation of abortion in general has therefore to be considered as a key element of women's human right to safe motherhood, not only because it allows women to take control over their own bodies, but also because it contributes to strengthening maternal health, which is at the core of safe motherhood.

Some scholars argue that although so far no UN treaty body has acknowledged a general human right to abortion, this right derives from other human rights. In this regard, some scholars, such as Margolin, consider that the right to abortion is implicitly enshrined in Article 3 UDHR.<sup>195</sup> Similarly, Huff asserts that although it is not explicitly mentioned, a general right to abortion is found in Article 12 of the CEDAW.<sup>196</sup> Neubauer, who was vice-chair of the CEDAW Committee in 2013 and 2014, seems to confirm this analysis by asserting that 'the CESCR is currently drafting a General Comment on reproductive rights, and we hope it will adopt an authoritative position in favour of abortion, albeit this organ is not as feminist as the CEDAW Committee'.<sup>197</sup> Considering that a right to abortion is necessarily contained in Articles 3 UDHR and 12 CEDAW is essential from a feminist standpoint, since it is the only way to enable women to make an informed choice to go through pregnancy.

<sup>190</sup> The Conversation, 'Doctors' Moral Objections Don't Justify Denying Abortion Access' (2 December 2013) available at <http://theconversation.com/doctors-moral-objections-dont-justify-denying-abortion-access-20196> (Accessed 28 April 2016).

<sup>191</sup> Rebecca J Cook and Mahmoud M Fathalla, 'Duties to Implement Reproductive Rights' (1998) 67 *Nordic Journal of International Law* 1, 6. For a more detailed analysis on how international human rights tackle the conscientious objection in the fields of contraception and abortion. See generally Luisa Cabal, Monica Olaya and Valentina Robledo, 'Striking a Balance: Conscientious Objection and Reproductive Health Care from the Colombian Perspective' (2014) 16 *Health and Human Rights* 73, 75-76.

<sup>192</sup> See generally for example Gillian E Metzger, 'Abortion, Equality and Administrative Regulation' (2007) 56 *Emory Law Journal*, 865-908.

<sup>193</sup> WHO, *Unsafe Abortion: Global and Regional Estimates of Incidence of and Mortality due to Unsafe Abortion with a Listing of Available Country Data in 2008*, (6th edition 2011) UN Document WHO/RHT/MSM/97.16, 1.

<sup>194</sup> HRC, CO on Ecuador (18 August 1998) CCPR/C/84/Add.6 para 11.

<sup>195</sup> Margolin (n 26) 82.

<sup>196</sup> Huff (n 144) 246.

<sup>197</sup> Violeta Neubauer, interviewed by the author on 26 June 2014.

It is relevant, however, to point out that the CEDAW Committee does not defend a right to abortion in the same way that they defend a right to contraception, since CEDAW does not consider abortion as a primary family planning method.<sup>198</sup> This indicates that much emphasis should be placed on prevention. If this position can be explained by the fact that abortion is likely to have adverse effects on a woman's health,<sup>199</sup> it might also arise from ethical considerations since scientific debates on the beginning of life are still ongoing.<sup>200</sup>

In this context, it is arguable that, if States have to guarantee access to abortion for every woman as a component of the international human right to safe motherhood, they must be able to introduce relevant regulations to govern the exercise of this right. For instance, a State should be able to establish a time of reflexion before proceeding to an abortion, or to fix a reasonable time limit (for example, in order not to allow abortion when the foetus is viable). Nevertheless, it is important to stress that these regulations must be introduced to help a woman to make an informed decision. In other words, they must aim to strengthen the right to safe motherhood rather than limiting it. Hence, the requirement of a parental permit or of paying a price to access an abortion infringes the right to safe motherhood, since it breaches women's self-determination and, subsequently, women's right to safe motherhood.

In this regard, safe motherhood is not a right that denies different protections of the foetus in all situations. At the opposite, it is arguable that this right may be advanced to grant the foetus with some protection, whereas it is not internationally recognised as a human being.

One of the biggest challenges that the UN still has to face to effectively ensure safe motherhood is precisely the enhancement of the protection against mother-foetus and mother-baby HIV transmission.

## **B. Tackling Mother-foetus and Mother-baby HIV Transmission**

If tackling HIV transmission from the mother to her foetus (during pregnancy) or her baby (during delivery and breastfeeding) is a component of the right to safe motherhood and underlines its originality, then the UN still has to enhance the legal protection granted to this right and may need to take a lesson from South Africa.

One of the three modes of HIV infection lies in mother-to-foetus and baby-transmission before, during or shortly after birth.<sup>201</sup> The HIV-positive status of a pregnant woman or mother may have consequences not only for transmission of the infection to her foetus or infant, but also to her personal health, due to the fact that pregnancy may make her even more vulnerable and increase the probability of transmission to the foetus and then to the baby, as a result of becoming pregnant.<sup>202</sup> As regards this second consideration, it may be argued that, States' inaction on mother-baby HIV transition prevention measures constitute a form of gender-based discrimination. More generally, if the woman decides to go through pregnancy and childbirth, it is necessary to protect both the woman and her baby or infant. This observation converges with the analysis delivered previously, pertaining to the pregnant woman's right to adequate nutrition.<sup>203</sup>

<sup>198</sup> CEDAW Committee, CO on Azerbaijan (6 February 1998) A/53/38, para 66.

<sup>199</sup> See for example : Jerry JI Cooper, 'Abortion' (1979) 3 Legal Medical Quarterly 260, 260 – 262.

<sup>200</sup> For example, see generally : Don Marquis, 'Abortion and the Beginning and End of Human Life' (2006) 34 Journal of Law, Medicine and Ethics, 16.

<sup>201</sup> WHO, 'HIV/AIDS' available at: [http://www.who.int/topics/hiv\\_aids/en/](http://www.who.int/topics/hiv_aids/en/) (Accessed on 8 May 2016).

<sup>202</sup> Farai D Madzimbamuto, Sunanda Ray and Keitshokile D Mogobe, 'Integration of HIV Care into Maternal Health Services: a Crucial Change Required in Improving Quality of Obstetric Care in Countries with High HIV Prevalence' 13 (2013) BTM International Health and Human Rights 27, 28.

<sup>203</sup> See generally para II(A)(ii) above.

In its General Recommendation n°15 on women and AIDS, the CEDAW Committee refers both to 'women and children' without directly stating that a protection against mother-baby transmission has to be ensured.<sup>204</sup>

As underscored by Cook and Dickens, Article 12 of the CEDAW entitles HIV-positive pregnant women, as every female, to legal standards of care in the prenatal period and during delivery. In addition, they explain that States have to allow seropositive mothers to benefit from advice on possible breastfeeding alternatives.<sup>205</sup> They argue that whereas HIV-positive pregnant women have a right to access to health services and birthing centres equipped to attend to seropositive patients, States have to ensure they suffer no discrimination on the grounds of their infection.<sup>206</sup> In a previous comment, Cook and Dickens have asserted that the non-discrimination principle is the minimum requirement that States have to fulfil in relation to the particular rights granted to HIV infected persons.<sup>207</sup> Cook, Dickens and Fathalla also deduce from the CEDAW a right for seropositive women to benefit from anti-retroviral drug treatments during 'pregnancy, confinement and the post-natal period'. Other scholars, in particular Madzimbamuto, Ray and Mogobe have adopted the same position.<sup>208</sup>

Furthermore, Article 24(2)(d) of the CRC establishes an obligation on States parties 'to ensure appropriate prenatal and post-natal health care for mothers'. Cook and Dickens tend to adopt an exclusively women's based approach to analyse this article. These scholars do not mention the particular perspective that arises from Article 24(2)(a) for the foetus. This provision establishes that States have to take all appropriate measures in order to 'diminish child and infant mortality'. Given that twenty percent of babies who are born HIV positive in Africa have a life expectancy shorter than uninfected infants,<sup>209</sup> it could be argued that according to Article 24(2)(a) of the CRC, States have the duty to give the relevant medication to avoid not only the HIV mother-child transmission, but also the mother-foetus contamination. Such a deduction can be made without any reference to the debate surrounding the beginning of the life mentioned above.

However on this point, it seems difficult to consider jointly the mother and the foetus as having a group of rights. In terms of anti-HIV drugs, the foetus interest's does not necessarily converge with the mother's. A balance of interests therefore seems necessary. Although they acknowledge that the administration of the anti-retroviral drug to the pregnant woman is likely to have negative incidences on her foetus, Madzimbamuto, Ray and Mogobeht consider it as a *sine qua non*, albeit not sufficient, condition to eradicate maternal mortality.<sup>210</sup> It has to be underscored that the issue here is different from the one developed as regards abortion since it is considered that the question arises after the woman has freely chosen to go through pregnancy and childbirth. A conflict can exist between her right to go safely through pregnancy and her right to have a healthy infant, both entailed in her right to safe motherhood.

Several scholars, especially Jönsson and Jönsson clarify this argument by stating that even if the responses to HIV have largely been framed throughout international human rights, national laws have a key role to play and the protection they grant differs from State to

<sup>204</sup> CEDAW Committee, 'General Recommendation 15' (1990) UN Document A/45/38.

<sup>205</sup> Cook and Dickens (n 128) 329.

<sup>206</sup> *ibid* 329.

<sup>207</sup> Rebecca J Cook and Bernard M Dickens 'Human Rights and HIV-positive Women' *International Journal of Gynecology & Obstetrics* 77 (2002) 55, 56.

<sup>208</sup> Madzimbamuto, Ray and Mogobe (n 202) 30.

<sup>209</sup> Marie-Louise Newell, Hoosen Covadia, Marjo Cortina-Borja et al, 'Mortality of Infected and Uninfected Infants born to HIV Infected Mothers in Africa: a Pooled Analysis' 364 (2004) *The Lancet* 1236, 1237.

<sup>210</sup> Madzimbamuto, Ray and Mogobe (n 202) 30 quoting J Y Chen, H J Ribaud, S Souda, et al, 'Highly active antiretroviral therapy and adverse birth outcomes among HIV-infected women in Botswana' 11 (2012) *Journal of Infect Dis*, 1695–1705.

State.<sup>211</sup> Nevertheless, national strategies in the field of HIV/AIDS have been criticised either because they intervene too late, in particular in relation to women and infants,<sup>212</sup> or because they are understood as breaching other human rights. For instance, it seems relevant to mention that mandatory HIV testing put in place in the United States of America, although the US is not party to the CEDAW, has been considered to be a violation to the right to privacy.<sup>213</sup>

Although, as aforementioned, the pregnant woman's interest does not necessarily coincide with the foetus, she can choose to protect it against HIV transmission. South Africa, in the midst of an HIV pandemic with around six million people infected,<sup>214</sup> acknowledges an enforceable right for the pregnant woman or woman who recently gave birth to get the anti-drug retroviral in order to have her baby protected. This is the major contribution of the Constitutional Court of South Africa's decision in the case *Minister of Health v Treatment Action Campaign*.<sup>215</sup> This case is a particularly significant example of socio-economic rights justiciability.<sup>216</sup> Even if the economic barriers still remain, the on-going nature of the women's right to safe motherhood may lead the UN to develop such initiatives, considering the access to the retroviral as a component of maternal health care.

## 5. Conclusion

In conclusion, although the criteria that distinguish a human right from a mere social concern remain debated in literature, safe motherhood can qualify as a human right. Safe motherhood represents a universal value that is fundamental both for groups and individuals. It refers to a multifaceted right that while closely interrelated with other women's rights, exists separately and distinctively from them. Guaranteeing safe motherhood as a human right also reflects feminist claims and aims at tackling all forms of discrimination against women to fully ensure gender equality.

The UN legal bodies have made important efforts to frame a human right to safe motherhood. The CEDAW Committee acknowledges 'a women's human right to safe motherhood' that mainly encompasses access to maternal health care. If this dimension is crucial to allow women to go safely through pregnancy and childbirth, as well as to have a healthy infant, the right to safe motherhood is broader. The UN bodies are shaping it, by making it compatible with all aspects of a woman's life. Motherhood therefore should derive from an informed decision instead of from violence or lack of sexual education. The right to safe motherhood thus places important obligations on States in the fields of health, security, family life, and an effective women's right to work, for instance. The added value of the right to safe motherhood lies in the connections that this right creates between all women's rights related to the highest attainable standard of living in the context of pregnancy, childbirth and lactation.

<sup>211</sup> See generally: Christer Jönsson and Kristina Jönsson, 'Global and Local Health Governance: Civil Society, Human Rights and Hiv/Aids' 33 (2012) *Third World Quarterly* 1719.

<sup>212</sup> DC Jayasuriya, 'Aids-Related Legislative Strategies Relating to Women and Infants' 7 (1997) *International Journal of Law and the Family* 1, 3.

<sup>213</sup> Sheree Gootzeit, 'Expedited HIV Testing: an Unnecessary Test that is Allowing the State to Trample on a Woman's Constitutional Rights' 7 (2001) *Cardozo Women Law Journal* 187, 188.

<sup>214</sup> UNAIDS, 'Report on the HIV/AIDS Epidemic' (2002) available at : [http://data.unaids.org/pub/Report/2002/brglobal\\_aids\\_report\\_en\\_pdf\\_red\\_en.pdf](http://data.unaids.org/pub/Report/2002/brglobal_aids_report_en_pdf_red_en.pdf) (Accessed 5 May 2016).

<sup>215</sup> *Minister of Health v Treatment Action Campaign* (2002) 5SA721 (Constitutional Court of South Africa).

<sup>216</sup> For a detailed analysis of the context of the *Minister of Health v Treatment Action Campaign* case, see Jönsson and Jönsson (n 211) 1726-1728.

As constructed within the UN legal system, the right to safe motherhood accordingly constitutes an umbrella concept. It is an on-going process that has to face two main categories of obstacles. On the one hand, substantial economic lacks in States parties, on the other hand, the heavy weight of traditions that tend to limit women to their reproductive function.

In order to put an end to patriarchal conceptions and to effectively ensure a women's right to safe motherhood, it is therefore necessary to acknowledge a women's right to abortion, that would not be limited to therapeutic abortion or abortion after rape. This is the biggest challenge that the UN has now to face to complete and strengthen the right to safe motherhood. The second major issue that should be addressed concerns enhancing the legal protection granted to HIV mother/ baby transmission.

Moreover, if it now may be asserted that a women's right to safe motherhood exists within the UN legal system, its recognition is long overdue. The content and understanding of this right has almost exclusively being framed over the past decade.

This observation may explain the substantial failure of the fifth Millennium Development Goal: maternal mortality has only decreased by 45% since 1995, while the initial objective lay in a reduction of 75%.<sup>217</sup> Nevertheless, due to the massive efforts undertaken by the UN, the Sustainable Development Goals' have been adopted in September 2015. The third of these goals aims to '[e]nsure healthy lives and promote well-being at all ages',<sup>218</sup> while the fifth one is to 'achieve gender equality and empower all women and girls'.<sup>219</sup> Therefore, it is hoped that these measures, on top of the significant steps already taken, will see the right to safe motherhood ensured for women around the world by 2034.

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<sup>217</sup> WHO (n 2).

<sup>218</sup> United Nations, Sustainable Development Platform (n 38).

<sup>219</sup> *ibid.*